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No. 06-1268

IN THE

Supreme Court of the United States

ROBERT A. UNDERWOOD AND FRANK B. AGUON, JR.,
Petitioners,

v.

FELIX P. CAMACHO, MICHAEL CRUZ, AND THE GUAM ELECTION COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Guam

REPLY BRIEF OF PETITIONERS

BRIAN J. FISCHER
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

PAUL M. SMITH*
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Petitioners

*Counsel of Record

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REPLY BRIEF OF PETITIONERS

Respondents fail to offer a persuasive defense of Guam's decision to alter its prior interpretation of congressional intent concerning whether the statutory term "votes cast," used in section 1422 of the Guam Organic Act to define the votes included in the majority-vote pool, includes "votes cast" *improperly*. The plain language, legislative history, and policy of the Act provide no definitive answer, but each points in favor of including overvotes in the pool of votes of which a candidate must win a majority. These indications of congressional intent are buttressed by the fact that Congress has repeatedly shown that it knows how to create a majority-vote requirement excluding votes cast invalidly — when that is its intent. Respondents' primary argument is that the weight of the case law points the other way, but that claim does not withstand a review of the cases cited.

Given all these reasons to conclude that the decision below misinterpreted congressional intent, as well as all the evidence that Guam's change of course resulted from an overreaction to this Court's analysis of a completely distinct statutory issue in *Gutierrez v. Ada*, 528 U.S. 250 (2000) ("*Gutierrez*"), a grant of review would be highly advisable. Because the question presented is one of federal law, and since no Article III court has yet to review the decision below, there is every reason to anticipate that when it next arises (in Guam or the Virgin Islands) it will be litigated in a federal court that may reach a result diametrically opposed to that reached here. The Court should not lightly choose to leave in place this degree of uncertainty about the basic rules of an election process, particularly since recent history suggests that very close contests arise in these territories in nearly every election.

1. Apparently unwilling to live with the actual facts relevant to the issues at hand, respondents resort to

accusations that the petition is "disingenuous at best" and borders on "misrepresentation." Br. in Opp. at 1-2. But the facts support what petitioners have said. Until this election, the Guam Election Commission ("Election Commission") consistently included overvotes in the denominator used to determine if candidates received a majority of "votes cast" under the Guam Organic Act, 48 U.S.C. § 1422. It did so even though it sometimes excluded undervotes (as this Court ultimately ruled in *Gutierrez* that it should). These facts are supported by the rulings on the 1998 gubernatorial election. *See Gutierrez*, 528 U.S. at 252; *Ada v. Government of Guam*, 179 F.3d 672, 675 (9th Cir. 1999) ("Write-in ballots and overvoted ballots were included in the total from which a majority was determined.") *rev'd on other grounds*, 528 U.S. 250 (2000); *Ada v. Government of Guam*, No. Civ. 98-66, 1998 WL 1118593, at *1 (D. Guam Dec. 9, 1998) (summarizing the Election Commission's certification of election results which included overvotes in the base but excluded undervotes) *aff'd*, 179 F.3d 672 (9th Cir. 1999). The same facts were accepted by the Supreme Court of Guam here. Pet. App. 24a n.4.[1] So the question remains why the practice changed suddenly in this election. As we

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[1] Respondents claim that the Supreme Court of Guam "made no finding concerning the Election Commission's historic treatment of overvotes." Br. in Opp. at 3 n.6. A plain reading of the opinion shows beyond cavil the court's acceptance of the factual premise that the Election Commission's past practice was to include overvotes in the vote pool. Pet. App. 24a n.4. Nor is it accurate to say that the Election Commission called "the treatment of overvotes" a "matter of first impression" in this case. Br. in Opp. at 3. The quoted language referred only to the first-time analysis of the new local statute, Title 3 of the Guam Code Annotated, section 11114 (enacted after the 1998 election), which was indeed a matter of first impression. Pet. App. 28a-29a ("It is important to note that § 11114 was amended by P.L. 25-146 on May 27, 2000, and *the instant application of § 11114(c) is a matter of first impression* with the [Election Commission].") (emphasis added).

have shown, it is apparent that the Election Commission reversed course as part of a chain reaction of misreadings of, and overreactions to, *Gutierrez*. Pet. 4, 7-14.

2. Attempting to avoid review by arguing the merits, respondents adopt two strategies. First, they conflate the question whether a vote should be tallied in favor of a given candidate with the question whether a vote should be part of the majority-vote pool. Thus, they note that the ballot warned that "overvotes would not be counted," and draw the conclusion that voters "would have known that overvotes would not be treated as 'votes cast'" for purposes of the majority-vote requirement. Br. in Opp. at 2. But warnings about what votes will "count" for candidates say nothing about whether invalid votes are "votes cast" properly included in the denominator in the majority-vote calculation.[2]

Second, respondents strive to portray existing case law as supporting the ruling below. They emphasize that petitioners have "failed to come forward with a single case in which the term 'votes cast' was held to include invalid and spoiled votes *in a candidate race*." Br. in Opp. 8 (emphasis added). In so doing, they carefully add the qualification relating to "candidate" races because, as they acknowledge, *id.* at 11-12, the cases in the referendum context goes both ways.

Then, respondents provide a list of cases they say support their view "that overvotes must be excluded from the determination of whether a *candidate* has received a majority of the votes cast." *Id.* at 8 (emphasis added). Remarkably,

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[2] The same flawed argument is implicit in the discussion of the fact that Congress is deemed to have ratified 3 G.C.A. § 11111, which states that any ballot "not marked as provided by law shall be void." That statute clearly speaks only to the question whether a vote will be counted for a given candidate. (Otherwise there would have been no need to pass 3 G.C.A. § 11114 addressing overvotes and the majority-vote calculation.) Any congressional ratification of section 11111 is therefore irrelevant.

however, having carefully excluded referendum cases from consideration, respondents supply a list of cases *most of which are referendum cases*. *Id.* at 9 (citing to *Hornsby v. Hilliard*, 189 So. 2d 361, 361-62 (Fla. 1966); *Wooley v. Sterrett*, 387 S.W.2d 734, 739-40 (Tex. Civ. App. 1965); *Stembridge v. Newton*, 99 S.E.2d 133, 133 (Ga. 1957); *Port of Palm Beach Dist. v. State*, 22 So. 2d 581 (Fla. 1945)).[3]

If that were not bad enough, two pages later, respondents criticize *petitioners'* reliance on statutes in which Congress has specified that the majority-vote pool is limited to "valid votes cast." Responding to petitioners' argument that these statutes counsel against finding a "valid votes" limitation implicit in the Organic Act, respondents contend that these statutes provide no basis for divining congressional intent here *because they are referendum statutes*. Br. in Opp. at 11 ("Petitioners have failed to explain any principled reason why this Court should find referendum cases or statutes . . . persuasive in the current context.")

Respondents cannot have it both ways, clandestinely relying on referendum cases that help them while rejecting as irrelevant those that do not. Referendum laws are indeed different, for two reasons. First, as the Court suggested in *Gutierrez*, there is no need for a winner in a referendum context, so a more onerous majority-vote test including

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[3] The other two cases that respondents cite are even less relevant. *Rodriguez v. Bexar County*, 385 F.3d 853, 861 (5th Cir. 2004), the case respondents highlight (Br. in Opp. at 8-9) involved the question whether overvotes should be included in an expert analysis in a case under section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Obviously, in assessing the electoral performance of a particular minority district in elections where there was no majority-vote requirement, overvotes are irrelevant, but that says nothing about the instant case. The passage from *Waters v. Gneimi*, 907 So. 2d 307, 311 (Miss. 2005) (cited at Br. in Opp. at 9), is dictum. Moreover, it is far from clear what the court meant to say in indicating that "overvotes are not "counted" for a particular election.

overvotes in the pool might be said to make sense. 528 U.S. at 256. On the other hand, because the choice in a referendum situation is binary — yes or no — including overvotes in the majority-vote pool in that setting has the effect of treating them the same as valid "no" votes. As one court explained:

> There were but two choices in the election here. If we were to hold that the bonds must be approved by a majority of the total of ballots indicating a choice and those indicating none, it would be the equivalent of deciding that the latter, not having indicated approval, should be considered as showing disapproval.

Port of Palm Beach Dist. v. State, 22 So. 2d 581, 583 (Fla. 1945). By contrast, in the 2006 Guam gubernatorial election, the choice was not binary because voters could write in anyone.[4] Moreover, in such a candidate contest, there is no way to know in advance which candidate would be helped by including overvotes in the majority-vote pool.

But the one area in which referendum statutes are completely apposite is in determining what Congress has said in the past when it has wanted to restrict a majority-vote pool to legal or valid votes and screen out overvotes. The fact that it has done so expressly is highly significant when it comes

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[4] Respondents, like the Supreme Court of Guam, fail to explain how the court's own definition of a "vote cast" allows write-in votes in the vote pool but not overvotes. Instead, respondents attempt to cloud the point by offering (incorrectly) that petitioners "never raised" the issue below. Br. in Opp. at 18. Write-in votes — even if classifiable as illegitimate (for a fictional character) or illegal (for an ineligible candidate) — *are* "votes cast" and should be part of the vote base. The Election Commission evidently agrees. Overvotes should be treated the same way. Neither respondents, nor the Supreme Court of Guam, nor the Election Commission offer a reason for disparate treatment. Pet. 19-20.

to interpreting a law that just refers to "votes cast" without excluding votes cast improperly.

Sidestepping, respondents cite a Hawaii statute in which the term "ballots cast" was used and say Congress could have been even clearer in section 1422 by using that phrase. Br. in Opp. at 12. That may be so.[5] But it does not explain why under section 1422 the vote pool should not include all *votes* — including overvotes — rather than only *valid* or *legal* votes. Congress's history of making that choice expressly argues against judicial recognition of such an implied limitation.

In the end, despite respondents' overblown claims, neither side has cited a non-referendum case directly on point. But given the laws where Congress expressly excluded overvotes, and the fact that petitioners' reading better comports with plain English (Pet. 16 & n.7, quoting *Black's Law Dictionary* definitions of "spoiled ballot" and "unintelligible vote"),[6] respondents' efforts to defeat review by arguing the merits are far from compelling.

3. Respondents go on to argue that the ruling below is consistent with *Gutierrez*. Br. in Opp. at 15. Defending the

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[5] It bears mentioning, however, that if Congress opted for "ballots cast" language in section 1422, undervotes as well as overvotes would likely be included in the vote base, meaning the difference between "votes cast" and "ballots cast" is not simply one of clarification or amplification. It would have real impact that Congress may not want.

[6] Additionally, an "illegal vote" is a "*vote* that does not count because it was *cast* by someone not entitled to vote or for an ineligible choice, or in a form or manner that does not comply with the applicable rules." *Black's Law Dictionary* 1607 (8th ed. 2004). A "simple majority" is "[a] majority of the members who vote, a quorum being present, disregarding absent members, members who are present but do not vote, blanks, and abstentions" (*id.* at 975) but *not* disregarding those who overvote or cast illegal or unintelligible ballots.

ruling below as "consistent" with *Gutierrez* is beside the point.[7] After all, it was petitioners who pointed out that *Gutierrez* says nothing about whether overvotes are "votes cast" for purposes of the Organic Act's majority-vote requirement. Pet. 4, 13-14. *Gutierrez* dealt only with the question whether the statutory phrase "in any election" required inclusion in the vote pool of people who did not participate in the gubernatorial election *at all*, just because they voted in another election the same day.

Nor is the Supreme Court of Guam's decision "consistent" with *Gutierrez* insofar as it leads to an ultimate winner faster than if a runoff is held. Br. in Opp. at 16. Congress specifically chose a majority-vote requirement rather than the less rigorous plurality standard understanding expedience was not its virtue. Pet. 21-23.[8]

4. Respondents also say there is no need for a definitive resolution of this issue now, pointing out that the district court can address the issue on an expedited basis when it next arises. Br. in Opp. at 20-21. But that misses the point. There is manifest value in having electoral rules be clear and indisputable before an election is held — so candidates know what they are trying to do and the election does not end up entangled in emergency litigation. That can only happen if the Court grants review here.

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[7] Respondents likewise claim the Supreme Court of Guam's decision comports with selected off-point case law. Br. in Opp. at 15-17. The inapplicability of those cases — which are the same cases the Supreme Court of Guam selected in patching together its definition of "votes cast" — was demonstrated in petitioners' opening brief. Pet. 18-20.

[8] Respondents' foreboding of perpetual runoffs incorrectly assumes that section 1422 requires a candidate to receive a "majority of votes cast," not just in a general election, but also in the runoff election. Br. in Opp. at 16 n.11.

Respondents minimize the importance of entering the next gubernatorial election with clear rules, claiming close-call elections are rare. Yet the meaning of section 1422 in these situations has been implicated in two of the three most recent Guam elections. Moreover, what is and is not a "vote cast" also impacts the Virgin Islands and its identical statute. And that territory was itself only a few steps away from facing these very questions in its most recent gubernatorial contest. Respondents' supposed doubts about whether the question presented would be litigated again (Br. in Opp. at 20) are dubious when one recalls that it was Respondent Camacho who initiated the previous section 1422 litigation. *See Gutierrez*.[9] This is an issue over which the Supreme Court of Guam does not hold the final word. History shows it will be litigated again at the next opportunity.

Similarly, even if respondents are correct in claiming that the benefits of clarifying section 1422's meaning will only reach Guam, that is not an appropriate basis to deny review. This Court has frequently reviewed territorial matters recognizing that resolution was directly significant to only the territory at issue. *See, e.g., Territory of Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959) (granting review "in view of the fiscal importance of the question to [the territory of] Alaska"); *Puerto Rico v. Rubert Hermanos, Inc.*, 309 U.S. 543, 544 (1940) ("The question here in controversy is a matter of great importance to Puerto Rico . . . ."). That is because the Court understood the importance of the issues presented to the people and governance of those territories. That importance is particularly pronounced and meritorious of this Court's attention where, as here, the question presented is one of federal law and the ruling below has not been reviewed by an Article III court.

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[9] In that litigation, Respondent Camacho did not contest the Election Commission's inclusion of overvotes in the vote base.

5. Finally, respondents' plea for deference to the Guam Supreme Court's reading of the Act is misplaced. Br. in Opp. at 21. Respondent Camacho very recently argued the same point unsuccessfully in *Limtiaco v. Camacho*, 549 U.S. ___, 127 S. Ct. 1413, 1420 (2007) ("Finally, the Governor mistakenly argues that we owe deference to the Guam Supreme Court's interpretation of its Organic Act."). The deference argument is no stronger here. The Organic Act remains a federal statute — one that this Court is "bound to construe according to its terms" (*id.*) — and the issue remains the intent of Congress.[10]

The Court in *Limtiaco* did allow that "[i]t may be true that we accord deference to territorial courts over matters of *purely* local concern." *Id.* (emphasis added). Just as territorial solvency (in *Limtiaco*) is not just Guam's concern, neither is its governance. Respondents nevertheless seize on that qualified and narrow exception and cite Guam's "rules and procedures for conducting its elections" in claiming that Guam's governance is "purely a matter of local concern." Br. in Opp. at 22. But Guam's enactment of provisions governing the mechanics of the gubernatorial election does not render *this* dispute "purely local." The issue here is not the meaning of any Guam statute. It is whether the Election Commission's enforcement of one of those provisions (3 G.C.A. § 11114) was proper under section 1422 of the Organic Act. Guam's Legislature, Election Commission and Supreme Court do not have the discretion to revise section 1422's "majority of votes cast" requirement — and then avoid review by an Article III court when challenged. *See Limtiaco*, 127 S. Ct. at 1419 n.2 ("Guam's territorial

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[10] Petitioners do not, as respondents' claim, adduce section 1422's legislative history to advocate a reading of that section "contrary to [its] plain language." Br. in Opp. at 14. The legislative history behind section 1422 *supports* its plain language reading. Pet. 21-23.

legislature cannot redefine terms used in a federal statute"). Deference is particularly unwarranted since the Supreme Court of Guam based its novel definition of "votes cast" primarily on rulings of this Court. Pet. App. 8a-12a.

None of the cases respondents press to avoid this Court's review of the Supreme Court of Guam's ruling suggest deference is warranted. *Pernell v. Southall Realty*, 416 U.S. 363 (1974), addressed a landlord/tenant dispute implicating District of Columbia Code, not federal law. 416 U.S. at 363-64. *Pernell* also stressed the Court's rightful place adjudicating *de novo* disputes over "Congressional Acts directed toward the District." 416 U.S. at 368. *Griffin v. United States*, 336 U.S. 704 (1949), merely held that devising District of Columbia rules of evidence was the domain of the District's highest appellate court, "in the absence of specific Congressional legislation." 336 U.S. at 717. And *Fisher v. United States*, 328 U.S. 463 (1946) dealt with this Court's role in supervising the common law rulings of D.C courts, not rulings by those courts on the meaning of federal statutes.

Additionally, respondents' suggestion that the Supreme Court of Guam is entitled to deference because it supposedly "clearly interpreted" section 1422 "according to its terms" is entirely circular. Br. in Opp. at 22. Petitioners of course disagree with respondents' glowing assessment of the decision below. Pet. 13-14, 16-23.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL M. SMITH*
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

*Counsel of Record

Counsel for Petitioners

BRIAN J. FISCHER
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

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